ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]

SUPREME COURT OF KANSAS.[2]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[3]

SUPREME COURT OF NEW YORK.[4]

ACCORD AND SATISFACTION.

Compromise of Debt.—Payment of a portion of a liquidated demand, in the same manner as the debtor was legally bound to pay the whole thereof, although it be received in satisfaction of the debt, is payment only in part; the agreement to receive such part payment in satisfaction is, in effect, one to give up the residue of the demand, which, being without consideration, is *nudum pactum*, and void: *Bliss et al.* v. *Shwarts*, 64 Barb.

But a debtor may offer anything as a substitute for the money due, whether of less or greater value; and if the creditor take it in satisfaction, it is a valid agreement, and the debt is discharged. The obligation of a third person, for any amount, operates in the same way, to discharge the debt: *Id.*

The plaintiffs and defendant agreed upon a compromise of a debt owing to the former by the latter, whereby the defendant was to pay twenty-five cents on the dollar, and $350 in addition. The plaintiffs received a negotiable bill of exchange, drawn by third persons, for a part of the debt, and the defendant's note for another portion, and in consideration thereof signed a receipt, stating that the same were "in full settlement of their claims" against the defendant. *Held*, that this was a sufficient consideration to uphold the discharge: *Id.*

ACTION.

Parties—Privies in Estate—Lis Pendens.—One cannot be a privy in estate to a judgment or decree unless he derives his title to the property in question subsequent to, and from some party who is bound by, such judgment or decree: *Hunt* v. *Haven & A., Administrators*, 52 N. H.

W. mortgaged a farm to B., and afterwards mortgaged the same farm to S.: after the mortgage to S., B. and W. had a long litigation in regard to the land conveyed in the mortgage to B., in which B. prevailed, and obtained possession of the land. *Held*, that S. was not a privy in estate with W. to the judgment in that case, so as to be bound or affected by it, but that he might, in a writ of entry against B. founded upon his mortgage, litigate the same questions which had been litigated and decided in the suit B. *v.* W.: *Id.*

The fact that S. may have known of the pendency of the proceeding between B. *v.* W., and may have aided W. in his suit, and even em-

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[1] From J. B. Black, Esq., Reporter; to appear in 37 Ind. Rep.

[2] From W. C. Webb, Esq., Reporter; to appear in 10 Kansas Reports.

[3] From J. M. Shirley, Esq., Reporter; to appear in 52 N. H. Rep.

[4] From Hon. O. L. Barbour, Reporter; to appear in vol. 64 of his Reports.

ployed and paid counsel to assist W. in the suit with B., does not make S. either a party or a privy in estate with W., so that he will be bound by the judgment in that suit: *Id.*

A *lis pendens* is not a notice to anybody to affect or operate upon existing rights. But the institution of a suit for the recovery of a specific property, is held in equity to be notice to a purchaser so as to affect and bind his interests in the decree, when such purchase is made *pendente lite*, and from a party to such suit; and the *lis pendens* begins from the service of the *subpœna* after the bill is filed: *Id.*

AGENT.

Power of.—*It seems*, that an agent employed to let premises and collect the rents, has no authority to consent to the substitution of a new tenant, and the discharge of the original lessee; that not being within the ordinary scope of such an agent's authority: *Wilson* v. *Lester et al.*, 64 Barb.

ASSUMPSIT.

Joinder of several Parties in several Rights.—A., B. and C. intrusted with D., a dealer in horses, one horse each, belonging to them individually, to be sold. D. sold the three horses together to the defendants, on credit, for $650,—no separate price being made for either of them in the trade. The three individual owners afterwards joined in an action of *assumpsit* against the purchaser to recover the price. *Held*, that the action could not be maintained: *Woodward* v. *Sherman*, 52 N. H.

ATTORNEY. See *Evidence*

Privileged Communications.—In an action against the grantees in a deed, upon a covenant therein that they would assume and pay certain specified encumbrances, as portions of the purchase-money, an attorney and counsel, who drew the deed, cannot be asked whether the deed was read over to the grantees, after it was drawn, and whether the question was up, then, as to whether the grantees would be personally liable on the deed. Such questions are improper, as calling for privileged communications between attorney and client: *Rogers* v. *Lyon et al.*, 64 Barb.

Lien—Right of Set-off.—On a motion by the receiver of a bank, against partners, to compel the payment of moneys in their hands, which they have collected as attorneys for the bank, or for the receiver after his appointment, one of the partners cannot set off a claim due to him individually from the bank: *Bowling Green Savings Bank* v. *Todd et al.*, 64 Barb.

Nor has he any *lien* upon the papers on which a foreclosure suit is brought by the firm of which he is a member, or upon the moneys which are the result of that suit, to secure the payment of his individual claim: *Id.*

But attorneys, in whose hands a bond and mortgage are placed, by a bank, for collection, acquire a lien thereon for any money due to them for services rendered to the bank; which lien will not be defeated by the subsequent appointment of a receiver of the bank: *Id.*

BANK. See *Usury.*

BILLS AND NOTES. See *Evidence; Husband and Wife.*

CARRIER. See *Shipper.*

Limitation of Liability—Notice.—It is well settled in New York that it is lawful for common carriers to limit, by a contract with their shippers, the extent of their liability for loss or damage on the articles conveyed: *Fibel* v. *Livingston, Pres't, &c.*, 64 Barb.

A notice at the head of a receipt given by an express company, for freight, stating that shippers must have the value of their packages inserted in such receipt, otherwise the company will not be responsible for an amount over $50, is insufficient to constitute a contract where it is not proven to have been brought to the knowledge of the shipper: *Id.*

The plaintiff on delivering to the defendant, a common carrier, goods for transportation, received a bill of lading, or receipt, containing a provision that the plaintiff should not demand, in any event, beyond the sum of $50, at which the goods forwarded were thereby valued, unless otherwise therein expressed, or unless specially insured by the carrier, and so specified in the receipt. The plaintiff accepted such bill of lading without making any objection to its terms, or giving any statement of the value of the property, or informing the carrier of his inability to read, or applying for any information as to the contents of such bill. *Held*, that the liability of the defendant to the plaintiff, under this contract, was limited to $50 and interest: *Id.*

Held, also, that, under the circumstances, the fact that the plaintiff was unable to read the contract, could make no difference: *Id.*

CHECKS.

Certifying—Forgery of.—The defendant certified a check drawn upon it as being good. The plaintiff took the check in the ordinary course of business, for value, and in good faith; and the check turned out to be a forgery. *Held*, that the bank was liable to make good its certificate, by paying the check: *Hagen* v. *The Bowery National Bank*, 64 Barb.

Whether the endorsement, purporting to be that of the payee named in the check, was genuine or not; or whether the person so named is a fictitious person; is immaterial. There can be no real payee of a forged instrument: *Id.*

As between the holder and the bank, the liability of the latter attaches upon the check being certified. And it being impossible to make title to money payable upon a forged check, through an endorsement thereof, proof of the genuineness of the endorsement is unnecessary for that purpose: *Id.*

Where the evidence showed that the person from whom the plaintiff received the check went by the name endorsed thereon, and that the endorsement was made by him; *Held*, that this was quite sufficient to protect the plaintiff against any imputation of negligence or bad faith in taking the check: *Id.*

CONSTITUTIONAL LAW.

Legislature.—Although an act of the legislature be unconstitutional, the legislature may, by a subsequent act, direct the expenses incurred by such legislation to be paid: *The People ex rel. Kingsland* v. *Bradley*, 64 Barb.

The power of the legislature is omnipotent, within constitutional limits, and the good of the greatest number is regarded by the legisla-

ture as its justification for the extraordinary use of its power: *The People* v. *The New York Gas Company*, 64 Barb.

DEBTOR AND CREDITOR. See *Accord and Satisfaction.*

DEED.

Tax Title.—Under the laws of 1862 a deputy county clerk could execute a valid tax deed: *Whitford* v. *Lynch*, 10 Kans.

DIVORCE. See *Husband and Wife.*

DOMICIL.

Domicil is controlled by intention. The intention is evidenced, often, by circumstances attending a residence, as well as by declarations: *Dupuy* v. *Seymour*, 64 Barb.

It *seems*, that there is no arbitrary rule by which the domicil of a person is proven. Each case must be decided according to the particular facts and circumstances which surround it: *Id.*

The domicil of birth or origin continues until it is proven to have been abandoned, or a new one has been obtained: *Id.*

Where the testatrix in a will executed abroad, was formerly settled, and her domicil, for many years, was with her husband, at the city of New York, *Held*, That it rested with those contesting the will to prove that the testatrix had ever formed the intention of changing her domicil; or that the facts and circumstances of the case were entirely inconsistent with an intention to retain her original domicil: *Id.*

ERROR.

Appeal in Criminal Cases—Repealing Statutes.—A criminal case must be removed from the District Court to the Supreme Court on appeal, and not on petition in error: *Boyle* v. *State of Kansas*, 10 Kans.

When a statute is repealed and the repealing statute is silent as to whether the rights and remedies which have accrued under the repealed statute shall be abrogated or not, sect. 1 of the "Act concerning the construction of statutes," (Gen. Stat. 998), will have the force and effect to save and preserve all such rights and remedies whether they belong to the state or to individuals, and in criminal as well as in civil cases, and a criminal action pending under the repealed statute at the time it is repealed may be prosecuted by virtue of said saving statute to final determination and judgment, notwithstanding said repeal. *Id.*

A question not raised by the record will not be considered by the Supreme Court, although defendant's counsel may desire to have it considered. *Id.*

Exclusion of Evidence.—Where the execution and existence of a written instrument is admitted by the pleadings, the Supreme Court will not reverse a judgment of the District Court for excluding evidence in proof of such written instrument, although the court may have excluded such evidence for a wrong reason: *Reed* v. *Arnold*, 10 Kans.

EVIDENCE. See *Mortgage.*

Declarations of Ownership.—Declarations of one in the possession of personal property that it is owned by another are competent evidence

in favor of the person declared to be the owner, against an officer who has attached it as the property of the declarant: *Putnam* v. *Osgood*, 52 N. H.

Explanation of Delivery of Draft.—Evidence to explain under what circumstances a draft on one officer of a railroad company was accepted by another officer of the same company, and delivered to the plaintiff having an account against the company, is admissible, there being an averment in the complaint that the draft was not delivered or received as payment. Such evidence does not contradict the tenor of the draft: *Chicago, C. and L. Railroad Co.* v. *West*, 37 Ind.

Admissions—Attorney.—In a suit by an attorney for his services, it is proper for him to testify as a witness to admissions made by the defendants, as to the amount realized by his successful defence of the action in which he was employed by them: *McNiel et al.* v. *Davidson*, 37 Ind.

There is no error in excluding evidence of a witness as to the value of services rendered by an attorney in a case, from his knowledge of what the services were, when he has stated that he cannot say what a reasonable fee would be; nor is it error to exclude such testimony, when it has not been shown that the witness offered is competent to state such value. Other persons, having knowledge on the subject, are competent witnesses, as well as lawyers. But a mere opinion is not evidence. There must be knowledge of facts which will give value to the opinion: *Id.*

Partnership—Declarations.—In an action against several persons as partners, the declarations, verbal or written, of one of them, who admits himself to be a partner, are not admissible to prove that another is a member of the firm: *Johnson* v. *Gallivan*, 52 N. H.

But where the question was whether a copartnership between A. and B. had been dissolved, and there was evidence tending to show that the business had been carried on the same after the alleged dissolution as before, a receipt signed by A. with his own name, and that of B. in B.'s presence, given for money paid in a transaction commenced before the alleged dissolution, with which B. was familiar, is admissible in evidence, although B. could neither read nor write. And a verdict will not be set aside because the jury were not directed to consider the receipt only in case they found that B. was aware of its contents, and knew that his name was signed to it, no special request for such instruction being made: *Id.*

Where it was proved that a letter, in the possession of a third person, after being shown to and read by a party to the suit, was kept by the person to whom it was addressed, who was out of the country at the time of the trial; it was *held*, that this was sufficient evidence to warrant parol proof of its contents: *Tucker et al.* v. *Woolsey et al.*, 64 Barb.

Written Instrument—Admission by Pleading.—Where a copy of a written instrument may be used the original may be used: *Reed* v. *Arnold*, 10 Kans.

Where an action is brought upon a written instrument and the execution of the same is expressly or by implication of law admitted by the pleadings, there is no issue upon which evidence in proof of the written instrument may be introduced: *Id.*

EXECUTION. See *Market Overt.*

Feigned Issue.

Trial—Verdict.—If no error was committed upon the trial of a feigned issue, the objection that the verdict is against evidence cannot be made available for a new trial: *McKinley* v. *Lamb*, 64 Barb.

Whether a testator declared a paper to be his last will in the hearing of the witnesses, and whether he requested them to sign it as witnesses, are questions of fact specially belonging to the jury, and their verdict should not be interfered with if there was no error of law on the part of the court: *Id.*

On the trial of a feigned issue the facts are expressly to be found by the jury. It seems hardly consistent, when the issue is sent to a jury to be tried, that the court should direct a verdict on matters of law. Such questions should be submitted to the court on the application for judgment upon the verdict: *Id.*

Former Action.

Pleading.—A plea of former adjudication, showing that the questions, things, rights, and matters in suit have been adjudged and tried before and by a tribunal of competent jurisdiction, is good on demurrer: *State ex rel. Combs* v. *Hudson*, 37 Ind.

Where the record upon which a plea of former adjudication is based, showing judgment against the defendant by default, only shows service of process on him by recitals in the record, without containing a copy of the notice and return of service, it may be shown that no jurisdiction of the person of the defendant was acquired by proper service: *Id.*

Frauds, Statute of. See *Vendor.*

Highway.

Obstruction—Law of the Road.—A traveller, who in meeting another turns to the left, but does not thereby occasion injury to any one but himself, is not a violator of law, and is not barred from maintaining an action against a town to recover for injuries sustained in consequence of an obstruction on the left hand side of the highway, with which he is thereby brought in contact: *Gale* v. *Lisbon*, 52 N. H.

Husband and Wife. See *Mortgage—Pleading.*

Married Women—Endorsement of Note.—A married woman may, with the consent of her husband, transfer her title to a promissory note, and for that purpose may endorse such note, but she cannot bind herself by the contract to a liability on the note: *Moreau et ux.* v. *Branson*, 37 Ind.

Divorce—Custody of Children.—In granting a divorce, the court has the power to decree the custody of the minor children, or any of them, to the party most suitable, considering the sex and age of the children and qualification of the parties: *Bush* v. *Bush*, 37 Ind.

It is the duty of the court on granting a divorce, where there is property, to make reasonable provision for the care and custody of any children of the marriage: *Id.*

Where there is an estate of twenty thousand dollars, accumulated during the marriage by the joint efforts of husband and wife, a fourth in value given to the wife is not unreasonable, where the divorce is granted for the misconduct of the husband: *Id.*

Divorce—Evidence to prove Adultery.—In an action by a husband against his wife, for divorce on the ground of adultery, a letter from the alleged paramour of the defendant to her, written during or immediately after the time of the alleged adulterous intercourse, and which was intercepted by the plaintiff, and never came to the knowledge or possession of the defendant, is not admissible in evidence against the wife; whether it confesses the adultery, or discloses a state of feeling towards her tending to prove it: *Hobby* v. *Hobby*, 64 Barb.

Nor is such letter admissible as evidence to contradict the writer's testimony as a witness: *Id.*

JUDGMENT.

Correction.—Where a judgment by default has been entered for a sum too small, as appears on the face of the papers, through an error of the clerk, the judgment may be corrected, on motion, at a subsequent term, although the amount for which it has been erroneously entered has been paid: *Sherman* v. *Nixon et al.*, 37 Ind.

Sufficient Recital.—An entry on the docket of a justice of the peace in these words: "Parties appeared ready for trial, after hearing the evidence the court decides in favor of the plaintiff, against the defendant, costs taxed to defendant $6.85," is not a sufficient recital of a judgment for the restitution of premises: *Wickersham* v. *Corlew*, 10 Kans.

LANDLORD AND TENANT.

Lease.—Where a lease is under seal, a parol agreement to terminate it and accept another person as tenant, without an actual surrender, is not sufficient to terminate the first lease, where the unexpired term is more than a year: *Wilson* v. *Lester et al.*, 64 Barb.

Nor will the mere receipt of rent from the assignee of the lease have that effect, where there is no proof of the surrender of the premises, and an acceptance of the assignee as tenant: *Id.*

LIS PENDENS. See *Action.*

MARKET OVERT.

Sheriff's Sale.—A sheriff's sale of personal property of A., upon an execution against B., vests no title in the purchaser: *Bryant* v. *Whitcher*, 52 N. H.

The English law in relation to sales in market overt has never been adopted in New Hampshire: *Id.*

MARRIED WOMAN. See *Husband and Wife—Mortgage—Pleading.*

MORTGAGE.

Chattel.—An agreement or understanding between a mortgagor and mortgagee of chattels, though made after the execution of the mortgage, that the mortgagor may sell the mortgaged property, or a part of it, on his own account, renders the mortgage void as to creditors, and such agreement or understanding will be proved by evidence that the mortgagor did so sell with the knowledge of the mortgagee, and without objection on his part: *Putnam* v. *Osgood*, 52 N. H.

PARTNERSHIP. See *Attorney; Evidence.*

PLEADING. See *Action.*

Duplicity—Demurrer.—A replication is not subject to the charge of

duplicity unless it sets up two or more answers to the matter relied on as a defence in the plea; but as many separate and independent facts and circumstances may be stated in it as are necessary to make a perfect answer to the plea: *Hunt* v. *Haven*, 52 N. H.

The demandant counted on his own seisin without stating title. The defendants pleaded that the plaintiff claimed by a particular title, setting it out, and alleged matter in estoppel. The plaintiff replied, answering and avoiding the estoppel, and the defendants demurred to the replication for duplicity. *Held*, that there must be judgment against the defendants,—first, because the replication was held good; and second, because, however the replication might be, the defendants had committed the first error in pleading,—their plea to the declaration being bad in substance, and not cured by pleading over: *Id.*

Suit against Married Woman.—The plaintiff declared against Mrs. Riley, the defendant, upon a promissory note, as having been signed by her jointly with one James L. Riley, her husband, then in full life, but since deceased. Upon demurrer, *held*, that the declaration was insufficient, and that the plaintiff must go further, and set forth such facts and circumstances as will show her liable, notwithstanding her coverture: *Wellcome* v. *Riley*, 52 N. H.

Receiver.

The fact that a receiver has been discharged is no answer to a motion for leave to bring an action against him to recover the possession of property where it appears that the claimants of the property had no notice of the motion to discharge the receiver, although he was aware of their claim; and that the receiver has sold the property claimed, after notice of the claim and after the service upon him of a petition and notice of motion for leave to prosecute: *Miller* v. *Loeb et al.*, 64 Barb.

Set-off against.—Where, after the commencement of a foreclosure suit, in the name of a bank, by its attorneys, a receiver of the bank is appointed, such appointment vests in the receiver the title to the mortgage, free from any right of set-off by the attorneys, of a claim for their services in that action. And if, upon a sale of the mortgaged premises, the proceeds come into the hands of the attorneys, they are received for the receiver, and not for the bank; and debts due the from the bank cannot be interposed against the receiver's title to such proceeds: *The Bowling Green Savings Bank* v. *Todd et al.*, 64 Barb.

Set-off. See *Attorney; Receiver.*

Shipper

Duty and Liability to Carriers.—There is an implied duty on the part of the shipper of goods of a dangerous character (such as nitroglycerine) to give notice of their dangerous nature to the shipowners, or the person who receives the goods in their behalf; and the omission to perform that duty is an act of negligence which renders the shipper liable for the consequences: *Barney, Pres't., &c.*, v. *Burnstenbinder*, 64 Barb.

In case of a shipment of goods of a dangerous character without such notice to the carriers, the fact that the omission of the shipper's agent

to give such notice is a *criminal*, or at least an *illegal* act, will not relieve the principal from liability for it, in a civil action, for damages: *Id.*

SURETY.

Release.—Where a surety on a promissory note, after his release from liability, by an extension of time given to the principal without his consent, receives an indemnity against his liability, without the knowledge of the holder, and subsequently surrenders the same to the principal, he may still avail himself of his discharge: *Rittenhouse* v. *Kemp et al.*, 37 Ind.

The fact that the surety returned such indemnity, without the knowledge of the holder of the note, at a date anterior to a new extension of time being given without the consent of the surety, does not render the latter liable, where the holder of the note had no information in regard to the indemnity having been given to the surety, when he extended the time of payment: *Id.*

USURY.

Loans by foreign Banks.—An isolated transaction of loaning money, in this state, by a foreign bank upon the note of the borrower, dated and payable here, is not necessarily a violation of the statute against unauthorized banking. It is not every loan made in this state by a foreign corporation which is prohibited: *The Hackettstown National Bank* v. *Rea*, 64 Barb.

When the maker and endorser of a note reside in New York, and the note is drawn, dated and payable here, the laws of New York must govern as to the rate of interest. If it be drawn with interest the rate will be seven per cent.; if drawn without specifying interest the same rate of discount must be legal: *Id.*

And where such note is discounted by a New Jersey bank the statute of New Jersey, limiting the rate of interest to six per cent., does not render the note usurious and void, when discounted at seven per cent.: *Id.*

A clause in the charter of a foreign bank providing that such bank shall not take more "than the legal rate of interest for the time being," is but a clause inserted for greater security, and does not alter the legal rate, or make that illegal which would otherwise be legal: *Id.*

VENDOR AND PURCHASER.

Delivery—Part Payment.—Where, upon a sale of chattels, anything remains to be done before the sale can be considered as complete, no title passes to the vendee until delivery and acceptance: *Walrath* v. *Ingles*, 64 Barb.

To constitute a payment as earnest, or a part payment, within the meaning of the Statute of Frauds, there must be an *actual transfer* or *delivery* of the thing or the money agreed to be given as earnest or part payment: *Id.*

The statute requires it to be paid at *the time* of the contract. A delivery of the thing afterwards, without acceptance, cannot operate to take the principal contract out of the Statute of Frauds: *Id*

WILL. See *Feigned Issue.*